

# PREVENTIVE DETENTION: *United States v. Salerno*\*

## I. INTRODUCTION

Our constitutional form of government is a delicate balance between two important principles: the protection of individual liberty interests and the preservation of society as a whole. *United States v. Salerno*<sup>1</sup> represents a confrontation between these two principles.

The 1984 Bail Reform Act favors the preservation of society by detaining, without bail, arrestees posing a threat to the safety of the community.<sup>2</sup> The Supreme Court recently considered the constitutionality of the Act in *United States v. Salerno*.<sup>3</sup> The Court upheld the pretrial detention of dangerous arrestees, finding that pretrial detention constituted a permissible governmental regulation and, therefore, the Act did not violate the fifth or eighth amendments to the Constitution.<sup>4</sup>

This Note will examine three topics. First, it will discuss the provisions and the legislative history of the 1984 Bail Reform Act. Second, it will discuss why the Act withstood constitutional challenge in *Salerno*. Third, it will address the constitutional issues raised by the lack of a specific limitation on the length of detention.

## II. BACKGROUND

### A. Provisions of the 1984 Bail Reform Act

The 1984 Bail Reform Act requires pretrial detention for arrestees charged with certain serious felonies when “no condition or combination of conditions will reasonably assure the safety of any other person and the community . . . .”<sup>5</sup> Pretrial detention is available in two situations: (1) when the arrestee has previously committed a specific offense while on release awaiting trial; and (2) when there is probable cause to believe that an arrestee, whose appearance at trial cannot be assured, has committed a major drug trafficking offense or a felony with a firearm.<sup>6</sup>

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<sup>1</sup> 107 S. Ct. 2095 (1987).

<sup>2</sup> 18 U.S.C. §§ 3142-45 (1982).

<sup>3</sup> 107 S. Ct. 2095.

<sup>4</sup> *Id.*

<sup>5</sup> 18 U.S.C. § 3142(e).

<sup>6</sup> *Id.*

In cases where the detention presumption arises, the court must hold a hearing at which a judicial official decides whether or not to detain the arrestee. Such a hearing must be held at the arrestee's first appearance.<sup>7</sup> At the detention hearing, the arrestee is entitled to the assistance of counsel, may testify, present or proffer evidence in his behalf, and may cross examine the Government's witnesses.<sup>8</sup> The judge's discretion in these hearings is limited to consideration of the following statutory factors: the nature and seriousness of the charges, the substance of the Government's evidence against the arrestee, the arrestee's background and character, and the nature and seriousness of the danger posed by the arrestee's release.<sup>9</sup> The Government must prove by clear and convincing evidence that releasing the arrestee would create a danger to the community.<sup>10</sup> A detention order must be in writing and state the reasons for detention.<sup>11</sup> Following a pretrial detention order, an arrestee is entitled to an expedited appeal.<sup>12</sup>

### *B. The Legislative History*

The legislative history of the 1984 Bail Reform Act reveals that Congress intended the Act to respond to a pressing social problem — the consequences of recidivism among arrestees released on bail.<sup>13</sup> In drafting the Act, Congress sought to respond conscientiously to the problem without exceeding the bounds of permissible regulation.<sup>14</sup>

Specifically, Congress intended to limit the scope of the Act by covering only "a small but identifiable group of particularly dangerous defendants," namely organized crime members, terrorists and narcotics traffickers.<sup>15</sup> Congress also indicated an intent to expressly limit the length of time an arrestee could be detained.<sup>16</sup> Some senators expressed a desire that detention be limited to an absolute ninety days.<sup>17</sup> Others wanted a sixty day limit with certain excludable time provisions.<sup>18</sup> The final version of the Act did not, however, contain a specific time limit.<sup>19</sup>

Congress also indicated that it intended to enact a permissible regulation that would not violate the due process rights of an arres-

<sup>7</sup> *Id.* at § 3142(f).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at § 3142(g).

<sup>10</sup> *Id.* at § 3142(f).

<sup>11</sup> *Id.* at § 3142(i).

<sup>12</sup> *Id.* at §§ 3142(b), (c).

<sup>13</sup> S. REP. NO. 225, 98th Cong., 2d. Sess. 4-7, reprinted in 1984 U.S. CODE CONG. & AD. NEWS 3183, 3185-3186.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> 130 CONG. REC. S941-45 (daily ed. Feb. 3, 1984).

<sup>17</sup> *Id.* at S941-45 (statements of Senators Thurmond, Laxalt and Grassley).

<sup>18</sup> *Id.* at S941, S945 (statements of Senators Specter and Mitchell).

<sup>19</sup> The Courts have interpreted the pretrial detention provisions as being subject to the ninety day provision of the Speedy Trial Act. *United States v. Colombo*, 777 F.2d 96, 100-101 (2d Cir. 1985) (citing Speedy Trial Act, 18 U.S.C. §§ 3161 et seq.).

tee.<sup>20</sup> Consequently, the Act includes several specific procedural safeguards.<sup>21</sup>

### III. *United States v. Salerno*

#### A. *Facts and Case History*

Anthony Salerno and Vincent Cafaro were arrested pursuant to an indictment charging twenty-nine counts of violating the Racketeer Influenced and Corrupt Organizations Act. The indictment alleged thirty-five specific acts of racketeering, including mail and wire fraud, extortion, and conspiracy to commit murder. A pretrial detention hearing was held in the district court. The Government conceded that neither defendant posed a risk of flight, but contended that no condition of bail would assure the safety of the community. The Government presented a lengthy proffer of evidence which indicated that Salerno was the "boss" of the Genovese crime family and Cafaro was his "captain." Two Government witnesses testified that Salerno had personally participated in murder conspiracies. Salerno opposed detention without bail by challenging the credibility of the Government's witnesses and offering a letter from his doctor stating that Salerno suffered from a serious medical condition. Cafaro responded that the Government's evidence was merely "tough talk."<sup>22</sup>

The district court granted the Government's motion for detention, concluding that the Government had established by clear and convincing evidence that no condition of bail would ensure the safety of the community. The court noted the serious nature of both defendants' involvement in organized crime and the resulting present danger to the community. The Second Circuit Court of Appeals, however, held the 1984 Bail Reform Act unconstitutional. The United States Supreme Court, in an opinion written by Chief Justice Rehnquist, reversed the Second Circuit.<sup>23</sup>

#### B. *United States Supreme Court*

The Supreme Court considered the constitutionality of the pretrial detention provisions of the 1984 Bail Reform Act under the fifth and eighth amendments to the Constitution. The Court held that when governmental interests are compelling and the procedural safeguards are sufficient, detention on the grounds of dangerousness does not violate the fifth amendment. The Court also rejected the

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<sup>20</sup> S. REP. NO. 225, 98th Cong., 2d. Sess. 8, reprinted in 1984 U.S. CODE CONG. & AD. NEWS 3182.

<sup>21</sup> 18 U.S.C. § 3142(f).

<sup>22</sup> *Salerno*, 107 S. Ct. at 2099.

<sup>23</sup> *Id.* at 2098-100.

eighth amendment challenge, holding that there is no absolute right to bail and that the eighth amendment does not prohibit the government from pursuing other compelling interests through the regulation of pretrial release.

### 1. Fifth Amendment Due Process

The Court first found that the Act survived a facial challenge under the fifth amendment due process clause.<sup>24</sup> The Court reasoned that incarceration does not necessarily imply punishment because the government's regulatory interest can at times outweigh an individual's liberty interest.<sup>25</sup> The Act, the Court reasoned, meets the criteria for proper governmental regulation of an individual's liberty.<sup>26</sup> Specifically, the Court found the Act responsive to a legitimate societal problem of criminal recidivism by those free on bond awaiting trial.<sup>27</sup> The Court further found that pretrial detention with careful procedural safeguards is not an excessive response to the problem.<sup>28</sup>

The Court cited precedent in which the governmental interest in regulation outweighed the liberty interest of an individual.<sup>29</sup> For example, dangerous individuals may be detained in times of war;<sup>30</sup> aliens awaiting deportation may be detained if they are dangerous;<sup>31</sup> the government may detain the mentally ill who pose a danger to the community;<sup>32</sup> the government may detain dangerous juveniles;<sup>33</sup> competent adults may be detained following arrest while awaiting a judicial determination of probable cause;<sup>34</sup> and, finally, arrestees may be incarcerated until trial if they present a risk of flight or may endanger a witness.<sup>35</sup> Considering these numerous examples, the Court concluded that detention on the ground of dangerousness to the community was not particularly novel.<sup>36</sup> Thus, the Court held when governmental interests are compelling and the procedural safeguards are sufficient, detention on the ground of dangerousness does not violate the fifth amendment.<sup>37</sup>

### 2. Eighth Amendment Excessive Bail

The Court also considered the pretrial detention provisions of the Act under the eighth amendment to the Constitution, which pro-

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<sup>24</sup> *Id.* at 2101.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* (citing *Bell v. Wolfish*, 441 U.S. 520 (1979)).

<sup>27</sup> *Salerno*, 107 S. Ct. at 2101.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 2102.

<sup>30</sup> *Id.* (citing *Ludecke v. Wadkins*, 335 U.S. 160 (1948)).

<sup>31</sup> *Id.* (citing *Carlson v. Landon*, 342 U.S. 524 (1979)).

<sup>32</sup> *Id.* (citing *Addington v. Texas*, 441 U.S. 418 (1979)).

<sup>33</sup> *Id.* (citing *Schall v. Martin*, 467 U.S. 253 (1984)).

<sup>34</sup> *Id.* (citing *Gerstein v. Pugh*, 420 U.S. 103 (1979)).

<sup>35</sup> *Id.* (citing *Bell v. Wolfish*, 441 U.S. 520 (1979)).

<sup>36</sup> *Salerno*, 107 S. Ct. at 2102.

<sup>37</sup> *Id.* at 2104.

vides that "excessive bail shall not be required."<sup>38</sup> The defendants in *Salerno* contended that the purpose of bail is to ensure the appearance of the accused at trial and that bail could only be denied if the accused would not appear. Congress, the defendants argued, had no authority to define other situations in which bail could be denied.<sup>39</sup>

The Court rejected the defendants' eighth amendment challenge, finding that there was nothing in the eighth amendment that provided an absolute right to bail.<sup>40</sup> The Court also found nothing in the eighth amendment prohibiting the government from pursuing other compelling interests through the regulation of pretrial release.<sup>41</sup> Since the defendants conceded the compelling purpose of the Act, the Court concluded that the Act did not violate the eighth amendment.<sup>42</sup>

#### IV. ANALYSIS

The Court's arguments supporting the constitutionality of pretrial detention are generally persuasive. Precedent exists for the regulation of an individual's liberty when there is a compelling governmental interest. Exceptions are made to the right to bail when the integrity of the judicial system is threatened by the accused's risk of flight or danger to a witness. Danger to the community is certainly as compelling an interest as preservation of the judicial system.<sup>43</sup>

The Court has recognized several exceptions to an individual's due process rights when the individual presents a danger to the community.<sup>44</sup> The authorization of pretrial detention in the Bail Reform Act is another constitutionally valid exception. Infringement on the liberty interest of a competent adult, however, must be carefully limited by procedural safeguards. The Act provides such safeguards at the detention hearing by allowing the accused the right to counsel, to testify on his own behalf, and to cross-examine government witnesses.<sup>45</sup> The judge's discretion is limited and the government must prove dangerousness by clear and convincing evidence.<sup>46</sup> These procedural safeguards are more stringent than those found in other constitutionally valid pretrial or dangerousness-based

<sup>38</sup> *Id.* (citing U.S. CONST. amend. VIII).

<sup>39</sup> *Salerno*, 107 S. Ct. at 2104.

<sup>40</sup> *Id.* at 2104-05.

<sup>41</sup> *Id.* at 2104.

<sup>42</sup> *Id.* at 2105.

<sup>43</sup> Mitchell, *Bail Reform and the Constitutionality of Pre-trial Detention*, 55 VA. L. REV. 1223 (1969).

<sup>44</sup> See *supra* notes 33-39 and accompanying text.

<sup>45</sup> 18 U.S.C. § 3142(f).

<sup>46</sup> *Id.*

detentions.<sup>47</sup>

The Court, however, does not clearly address the argument that the presumption of innocence is offended by the pretrial detention provisions of the Act. Although the Act has been criticized for unduly relying on an indictment to rebut the presumption of innocence,<sup>48</sup> the indictment's importance in determining detention without bail is limited and not unprecedented. Furthermore, the Act requires courts to consider several other factors in determining whether pretrial detention is proper, such as the strength of the actual evidence against an arrestee, the seriousness of prior convictions, the background and character of the arrestee, and the precise danger that the arrestee's release poses.<sup>49</sup> The indictment, therefore, is not the only factor used to support pretrial detention. Instead, it acts more as a threshold condition that gives the government jurisdiction over the individual. Furthermore, it creates a judicial duty not to release those properly in custody who pose a clear threat to the safety of the community. Because the indictment plays a limited role in determining the propriety of pretrial detention, any threat to the presumption of innocence is limited.

Moreover, consideration of the seriousness of the charges against an arrestee as a factor in denying bail is not unprecedented. Courts consider the charges against an arrestee when bail is denied on the grounds that the arrestee poses a risk of flight.<sup>50</sup> Thus, the use of the indictment under the Act is no greater threat to the presumption of innocence than already exists.

Although the strict procedural safeguards of the Act are generally adequate to insure due process, and its limited reliance on the indictment does not offend the presumption of innocence, the Act does lack one important safeguard. It does not limit the length of time an arrestee may be incarcerated while awaiting trial. The courts have interpreted the pretrial detention provisions as being limited only by the Speedy Trial Act.<sup>51</sup> The Speedy Trial Act, however, has been ineffective in protecting an arrestee from excessive incarceration.<sup>52</sup> Under the pretrial detention provisions of the Act, arrestees have been incarcerated for four,<sup>53</sup> six,<sup>54</sup> eight,<sup>55</sup> and sixteen months<sup>56</sup> while awaiting trial. Such lengthy detention is inconsistent with constitutional standards for permissible governmental regulation.

Proper governmental regulation must not be so excessive as to

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<sup>47</sup> *Schall v. Martin*, 467 U.S. 253 (1984).

<sup>48</sup> *Salerno*, 107 S. Ct. at 2107 (Marshall, J., and Stevens, J., dissenting).

<sup>49</sup> 18 U.S.C. § 3142(g).

<sup>50</sup> *Stack v. Boyle*, 342 U.S. 1, 3 (1951).

<sup>51</sup> See *supra* note 22.

<sup>52</sup> *United States v. Melendez-Carrion*, 790 F.2d 984, 996 (2d Cir. 1986).

<sup>53</sup> *United States v. Theron*, 782 F.2d 1510, 1516 (2d Cir. 1986).

<sup>54</sup> *United States v. LoFranco*, 620 F. Supp. 1324 (N.D.N.Y. 1985).

<sup>55</sup> *Melendez-Carrion*, 790 F.2d at 996.

<sup>56</sup> *United States v. Zannio*, 798 F.2d 544, 548-49 (1st Cir. 1986).

constitute punishment.<sup>57</sup> Pretrial incarceration for as long as eight months has been held to constitute punishment.<sup>58</sup> Consequently, in the absence of a clear limitation on the length of incarceration, arrestees may be detained under the Act for unconstitutionally long periods.

Moreover, lengthy incarceration is inconsistent with Congressional intent. The record of debate indicates discussion of both a sixty and ninety day time limit.<sup>59</sup> In fact, the length of time arrestees are being held while awaiting trial is well beyond either of the limits contemplated by Congress.

## V. CONCLUSION

In *United States v. Salerno*, the Court rejected fifth and eighth amendment challenges to the constitutionality of the 1984 Bail Reform Act. The Court, however, did not address the fact that the Act may permit arrestees to be detained for unconstitutionally long periods of time. The Speedy Trial Act, which courts have interpreted as governing the length of incarceration, provides a ninety day limit with provisions for excludable time. Under the provisions for excludable time, however, arrestees have been held as long as sixteen months while awaiting trial.

Case-by-case adjudication of the limits of Bail Reform Act detention will only further lengthen the criminal justice process. Amending the Act to provide a sixty or ninety day absolute limit would further the Congressional intent and ensure a "bright line" test for determining the proper length of pretrial detention. The Act, therefore, should be amended to include an absolute time limit on the length of detention.

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<sup>57</sup> *Bell v. Wolfish*, 441 U.S. 520, 535-37 (1979).

<sup>58</sup> *Fleming v. Nestor*, 363 U.S. 603 (1960).

<sup>59</sup> See *supra* notes 16-19 and accompanying text. Apparently, the Act lacks a time limit provision because Congress failed to reach a consensus on the length of detention.